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THE RIGHT OF BAILEES TO CONTRACT  
AGAINST LIABILITY FOR NEGLIGENCE.

BETWEEN the law of bailments as it stands today and as it stood at the ancient common law is fixed a wide and remarkable gulf, whose broad expanse is bridged only by the ever-increasing influence through the centuries of the law of contracts. The object of this article is to trace the progress of the law of bailments through the past and to study its present status, for the purpose of prophesying its probable future and discovering the direction it ought to take.

In the earliest English law there is some question whether the liability of bailees, including common carriers and others pursuing common callings, was that of insurance, or simply that of responsibility for negligence. Justice Holmes maintains that the liability of all bailees was that of insurance, and that the present so-called common law liability of common carriers and innkeepers is a fragmentary survival of the earlier law in regard to all bailees. Professor Beale defends the theory that at first bailees in general were liable only for negligence, and that the special liability of common carriers as insurers was established not even by the case of *Coggs v. Bernard*,<sup>1</sup> but by the case of *Forward v. Pittard*.<sup>2</sup> A middle theory holds that, according to the early law of England, all bailees pursuing a common calling were liable for some particular loss as insurers, but only common carriers were absolute insurers, and then not until the time of Lord Holt and Lord Mansfield; that all bailees were liable in trespass and detinue (and therefore *quasi* insurers) when they had a cause of action over against the wrongdoer; that after the origin of the writ of trespass on the case bailees were also liable where they had undertaken to do something (*assumpsit*) and were guilty of misfeasance; and that later, through the confusion of the growing principles of contract with the old principles of tort they were liable for a mere omission as well. But, whatever theory be adopted, it is certain that some time in the history of the common law, by custom and public policy,

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<sup>1</sup> 2 Ld. Raym. 908.

<sup>2</sup> 1 T. R. 27.

all bailees became liable both for positive acts of misfeasance (negligence?) and for strict neglects, and that some exceptional bailees were made absolute insurers except for the acts of God and the public enemy.<sup>1</sup>

These common law doctrines, as found in their advanced form, were inherited by the commonwealths of the United States.<sup>2</sup>

We start, then, with this common law liability of bailees, — a liability imposed by the sound public policy of the ages, for this it was which created the duty on the part of those who received property belonging to others to keep it with diligence and return it or deliver it over at the end of the bailment. Independently of the agreement of the parties the law indicated where men should not be negligent. This marked the climax in the development of the principles of tort law so far as the subject of bailments is concerned. To use the language of evolution, it was the perfection of a species. From that time the law worked along another line, for the development of the species of contract in bailments. While in early English history, therefore, bailments was regarded as a tort subject and the duties of the relation were created by law independently of the agreement of the parties, it was soon realized that *assumpsit* was not the legitimate field of torts. The subject of contracts was made distinct and characteristic by the successive actions of debt, covenant, and *assumpsit*, and further and further invaded the territory of bailments and carriers, until now it is natural to ask whether there is longer left in bailments and carriers any law of torts. Yes, it has not been supplanted. Its application is sometimes simply co-ordinate with that of contracts, sometimes still exclusive of contracts; but always, in the absence of agreement, there continues to rest upon the bailees of the different classes the general duty, created by the common law, to exercise slight, ordinary, or high diligence, or to insure, as the

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<sup>1</sup> Holmes, *The Common Law*, 164-205; 11 HARV. L. REV. 158-168; *Coggs v. Bernard*, 2 Ld. Raym. 909; *Doorman v. Jenkins*, 2 Ad. & El. 256; *Schiells v. Blackburne*, 1 H. Blk. 158; *Vaughan v. Menlove*, 3 Bing. N. C. 468; *Handford v. Palmer*, 2 Brod. & Bing. 359; *Searle v. Laverick*, L. R. 9 Q. B. 122; *Calye's Case*, 8 Coke 32; *Forward v. Pittard*, 1 T. R. 27; *Story, Bailments*, § 332.

<sup>2</sup> *Tracy v. Wood*, 3 Mason (U. S.) 132; *Eldridge v. Hill*, 97 U. S. 92; *Preston v. Prather*, 137 U. S. 604; *Spooner v. Mattoon*, 40 Vt. 300; *Thompkins v. Saltmarsh*, 14 Serg. & R. (Pa.) 275; *Wood v. McClure*, 7 Ind. 155; *Commercial Bank v. Martin*, 1 La. Ann. 344; *Stewart v. Western, etc., Co.*, 4 Biss. (U. S.) 362; *Cutler v. Bonney*, 30 Mich. 259; *Black v. Chicago, etc., Co.*, 30 Neb. 197; *McPadden v. Central, etc., Co.*, 44 N. Y. 478.

case may be. So that, ordinarily, a bailor may elect to sue in either tort or contract. This is right. It registers the common opinion as to the diligence such parties ought to exercise, and where they have not particularized as to the diligence they desire, it prevents the parties from escaping from all diligence. Every man owes a duty to every other not intentionally, or negligently, to injure him.<sup>1</sup>

But a more difficult question concerns us here. Granting that, in the absence of particular agreement, the tort duties still survive, if the parties so desire; can and should they be allowed by contract to lay aside all these tort duties and themselves determine just what their duties, rights, and liabilities to each other shall be?

Answering the first half of the question, so far as English law is concerned, although there are very few cases involving gratuitous and ordinary bailees, and the difficulty of tracing the development of the freedom of contract is consequently enhanced, yet there is no difficulty in knowing what the final outgrowth of the development has been. All liability for negligence may be excused. To that extent the parties may make any terms they desire.<sup>2</sup>

In the United States the history of the growth of the power of contract, like that of all other branches of the law, reveals a condition of strange perplexity. Every possible holding here finds an exponent, a champion. While, as in England, most of the instances of contract encroachments occur in connection with the exceptional bailments, doubtless because of the greater anxiety to get away from the more stringent common law liability there, yet the few existing cases on the unexceptional bailments cannot be styled harmonious. Almost unanimously it is held that bailees may increase the duty which they would otherwise be under, but to what extent they may decrease that duty is not clear. However, if the expression "gross negligence" be understood to include only wilful acts, probably a majority of the courts in the United States hold that the parties to the bailments under consideration may substitute for the common law any liability they may agree upon, except to excuse fraud, or wilful wrongdoing, or to violate any positive prohibitions of law. This would allow them to stipulate against liability for negligence in any degree.<sup>3</sup>

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<sup>1</sup> Holmes, *The Common Law*; Pollock & Maitland, *Hist. of Eng. Law*; Bigelow, *Torts*; *State v. Chew Muck You*, 20 Ore. 215.

<sup>2</sup> *Walter v. Railroad*, 2 E. & B. 750; *Van Toll v. Railroad*, 12 C. B. (N. S.) 75.

<sup>3</sup> *Lee v. Baldwin*, 10 Ga. 208; *Marks v. New Orleans Cold Storage Co.*, 107 La.

This doctrine is squarely held by New York, but the other courts which have passed upon the question have said they would not permit exemptions from liability for "gross negligence." Yet, in spite of the fact that literally negligence is negative and should exclude the idea of wilfulness, from the way the various tribunals have employed the words "gross negligence" and the general thought running throughout the context where they are found, it seems as though they had in mind some overt act of wilfulness, or bad faith, or fraud. Otherwise all distinction between the different bailments would inevitably be abolished. How could there be any justification for allowing borrowers, pledgees, and hirers of the different classes to narrow their obligations so as to be liable only for gross negligence, and not allowing depositaries and mandataries to change their liability in any particular? There is none. The courts could not have meant to announce such a principle. The different degrees of diligence, "high," "ordinary," and "slight," are simply the degrees of diligence which the ordinary prudent man would exercise if he were a bailee of that particular class, and any failure to exercise that is negligence. Hence it is submitted that the courts do not intend sometimes to uphold a contract against negligence and at other times not; that negligence in this connection is not capable of division; and that what the courts mean by their exception is wilful, wanton, reckless, or criminal acts, which they call "gross negligence," though strictly not negligence at all. If this is their true meaning, these decisions in our country are in harmony with the English and continental holdings. If it is not their meaning, the statement above as to the weight of authority in the United States is not correct.<sup>1</sup>

But, whatever uncertainty there may be as to the actual position of the courts, there is no uncertainty in the mind of the writer as

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172; *Conway Bank v. Am. Ex. Co.*, 8 Allen (Mass.) 516; *Smith v. Library Board*, 58 Minn. 108; *Gashweiler v. Wabash, etc., Co.*, 83 Mo. 112; *Wells v. Porter*, 169 Mo. 252; *Kinney v. Central Railroad*, 32 N. J. L. 407; *Dale v. Lee*, 51 N. J. L. 678; *Alexander v. Greene*, 3 Hill (N. Y.) 9, 7 Hill (N. Y.) 533; *Hollister v. Nowlen*, 19 Wend. (N. Y.) 234; *Wells v. Steam. Nav. Co.*, 8 N. Y. 375; *Moeran v. New York, etc., Co.*, 59 N. Y. Supp. 584; *Nat. Cash Reg. v. Callais*, 84 N. Y. Supp. 166. *Contra*, *Lancaster v. Smith*, 62 Pa. St. 47. See also *Memphis, etc., Co. v. Jones*, 39 Tenn. 517; *Direct Nav. Co. v. Davidson*, 74 S. W. Rep. 790; *Kimball v. Rutland, etc., Co.*, 26 Vt. 247; *Story, Bailments*, §§ 19, 22, 31, 32, 66, 182a, 238; *Lawson, Bailments*, § 13; *Schouler, Bailments and Carriers*, § 20; *Hutchinson, Carriers*, §§ 14, 40.

<sup>1</sup> *Omaha, etc., Co. v. Chollette*, 33 Neb. 143; *Stringer v. Alabama, etc., Co.*, 99 Ala. 397; *Kentucky, etc., Co. v. Gastineau*, 83 Ky. 119; *Louisville v. Filbern*, 6 Bush (Ky.) 574.

to what ought to be their position. Progress among men has ever been from status to contract. It is the common judgment of mankind that it is best for the individual and the race to have freedom of contract indulged so far as possible. Therefore I maintain that, on general principles, parties should be allowed freedom of contract here, and thus contract for exemption from liability for negligence if they desire. Of course, if there is any rule of public policy that would be violated, this should not be allowed. But is there any rule of public policy which would object to contracts of this kind by ordinary bailees, — that is, those pursuing avocations not affected with a public use or interest? The duties and obligations of these bailments cannot be thrown upon the bailees without their consent, and this being so, if they do consent to assume the duties, why should they not have the right to determine the nature of the same in every respect, and their responsibility for neglect thereof? It is true that such a contract might be a bad one for one of the parties, but so any contract that may be made is liable to be. Public policy does not yet forbid bad bargains. On the other hand, does it not seem like a harsh rule which, in addition to the gratuitous care of property, will make a depositary and mandatary liable for even gross negligence in spite of the stipulation of the parties? For the moment we will consider only the question of contracting against negligence, not including wilful and wanton acts, but using the term in its appropriate sense, in the words of Mr. Cooley, “the failure to observe for the protection of the interests of another person that degree of care, precaution, and vigilance which the circumstances justly demand, whereby such other person suffers injury.” Public policy forbids only such contracts as are opposed to the public will, or tend to subvert the public welfare, like those tending to immorality, or to deprive the public of the services of citizens, or to influence the public service, or to interfere with public justice. A contract of the kind under consideration bears no resemblance to any of these. It has no tendency to be injurious to the public, or against the public good; nor would any principle of public welfare or morality be infringed. It would seem as though there could be but one answer to a question of this sort, and that is that public policy makes no objection whatever, as found in either legislation or common law, for the contract is concerned only with the property rights of the individuals to the contract. Public policy is in its nature uncertain and incapable of being defined with exactness; and where the contract

is not prohibited by constitution or statute the extension of the principle should be carefully guarded.<sup>1</sup>

So much for the contract aspect of the subject. Let us now look at its tort aspect. Here the argument from analogy is equally strong, for so far as the allowance of exemptions from liability is concerned the principles of the tort of negligence ought not to be different from those of other comparable torts. In other torts, it is well established, consent is always a good defense to an action. More than this, consent is even sometimes a defense to criminal prosecution. This is on the principle that that to which a person consents is not esteemed in law an injury. *Volenti non fit injuria*.

In a suit, or indictment, for false imprisonment, if it can be shown that the act was done with the consent of the party complaining, that is a complete bar to all proceedings.<sup>2</sup> In an action for slander, or libel, all that the defendant need show by way of defense is consent to publication; even an agreement to accept an apology is sufficient.<sup>3</sup> The principle was well established at the common law that a tenant could protect himself against an action for waste by a contract "without impeachment of waste."<sup>4</sup> To an action of trespass, acquiescence, special contract, or leave and license, was always such justification as to defeat recovery.<sup>5</sup> In the same way consent is a complete defense to a suit for conversion,<sup>6</sup> or nuisance,<sup>7</sup> or an assault and battery, unless the latter amounts to an injury to the public as well as to the individual, as in case of breach of the peace, when public policy renders the consent illegal.<sup>8</sup>

Likewise, in the English and some American courts, it has been held that by an express contract, or an implied one, a servant may release his master from all liability to the servant, where statutes

<sup>1</sup> Egerton v. Brownland, 4 H. L. Cas. 1; Printing, etc., Co. v. Sampson, L. R. 19 Eq. 462, 465; Teal v. Walker, 111 U. S. 242; United States v. Trans-Missouri, etc., Co., 70 Fed. Rep. 201; Peterson v. Christiansen, 26 Minn. 377; Houlton v. Nichol, 93 Wis. 393.

<sup>2</sup> Floyd v. State, 12 Ark. 43; Berry v. Adamson, 6 B. & C. 528; Ellis v. Cleveland, 54 Vt. 437.

<sup>3</sup> Lane v. Applegate, 1 Stark. N. P. 97; Boosey v. Wood, 3 H. & C. 484; Schouppflin v. Coffey, 162 N. Y. 12.

<sup>4</sup> Garth v. Cotton, 1 Ves. 524; Bowles' Case, 11 Coke 82 b.

<sup>5</sup> Low v. Nettles, 2 Bailey (S. C.) 447; Windle v. Crescent, etc., Co., 186 Pa. St. 224; Lambert v. Robinson, 162 Mass. 34.

<sup>6</sup> Powell v. Hoyland, L. R. 6 Exch. 67; Powers v. Klenzie, 15 Mont. 177.

<sup>7</sup> Burkam v. Ohio, etc., Co., 122 Ind. 344; Woodward v. Seeley, 11 Ill. 157; White v. Manhattan, etc., Co., 139 N. Y. 19.

<sup>8</sup> State v. Beck, 1 Hill (N. Y.) 363; O'Brien v. Cunard, etc., Co., 154 Mass. 272.

have not expressly forbidden it; although, if public policy were ever going to speak, it ought to be here, because of the interest which the state has in the servant as a citizen, who ought to be guarded from danger. But such a contract may be made either before the employment begins, or afterwards, or after the injury, if based upon sufficient consideration.<sup>1</sup>

If consent is allowed to destroy a person's cause of action in all the foregoing torts, why not in the case of the tort of negligence? And if consent will destroy the tort liability, where is the logic for the objection to a contract destroying, modifying, or supplanting that tort liability?

It should be noted at this point that in the illustrations hereinbefore referred to the consent and the contracts have affected only the parties thereto. The moment they affect third parties public policy steps in and declares them illegal, so that any contract to get a person to commit any of the torts enumerated would be void, whether the tort was negligence, or assault, or battery, or slander, or libel, or waste, or false imprisonment, or malicious prosecution, or conversion, or nuisance, or trespass. An agreement which contemplates a civil wrong to a third person is illegal.<sup>2</sup>

In conclusion, then, it is my judgment that in the bailments of deposit, mandate, commodatum, pledges and pawns, and the ordinary hirings, all the bailees should be allowed to exempt themselves from liability for negligence, whether it be called "slight," "ordinary," or "gross," unless prohibited by special statutory enactments, provided that is the plain meaning of the contract; and as to exemption from liability for other acts than those which are negligent, the general principles of torts, as indicated above, should be applied. However, up to the present time, all that we can say is that the cases in New York, England, and some other foreign countries, where the civil law has more influence, have gone as far as this. But the great majority of the holdings in this country lean in this direction, and the law of bailments has not yet reached its final form; so that, judging by the direction of its change and progress in the past, it may be prophesied that some time in the future it will be allowed to bailees of these classes to make as broad

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<sup>1</sup> *Otis v. Penn. Co.*, 71 Fed. Rep. 136; *Western, etc., Co. v. Bishop*, 50 Ga. 465; *Fulton, etc., Co. v. Wilson*, 89 Ga. 318; *Purdy v. Rome*, 125 N. Y. 209; 20 Am. & Eng. Enc. 156.

<sup>2</sup> *Scott v. Brown*, L. R. 2 Q. B. 724; *Woodstock, etc., Co. v. Extension, etc., Co.*, 129 U. S. 643; *W. Va. Trans. Co. v. Pipe-Line Co.*, 22 W. Va. 600.



contracts as those referred to above, and to limit their common law liability of tort on the same principles as all other tort-feasors.

When we come to common carriers, innkeepers, and other bailees affected with a public interest, a different question confronts us. In regard to these two considerations may enter. One is the fact that a public interest may be involved. These occupations and enterprises may involve the safety of the lives of the citizens of the state, reasonableness of rates, unjust discriminations, and other matters affecting the general public in addition to the private parties who may make the contract. The other consideration follows from this. Because of these public interests the public has a right to control and regulate the businesses and to restrict the freedom of contract. In other words, public policy applies here as it did not in the other bailments. In guarding these public interests, in England and in this country from the time of its earliest colonization, it has been the immemorial law that the public has a right to regulate stage lines, ferries, hackmen, railways, wharfingers, auctioneers, innkeepers, bakers, millers, and the like, and in so doing to fix a maximum charge for services rendered, accommodations furnished, and articles sold, although as to some of them the public had conferred no franchise. This law of the ages has been reaffirmed and recognized by the Supreme Court of the United States.<sup>1</sup> With especial force should this right be applied to those monopolies which have the breath of life breathed into them by legislative act and have vested in them the power of eminent domain to take private property for their use, which under our Constitution must be for a public purpose. But the right of the public to regulate is not restricted to these enterprises, but applies to all affected with a public use. Under this principle the right of regulation has been invoked against water companies, cotton presses, general warehouses, street railways, canals, ferries, toll roads and bridges, wharves, telephones, telegraphs, gas companies, tolls of mills, salvage of logs, etc.<sup>2</sup>

This makes a great distinction between bailees whose business is

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<sup>1</sup> *Munn v. Illinois*, 94 U. S. 113; *Budd v. New York*, 143 U. S. 516.

<sup>2</sup> *Spring Valley v. Schottler*, 110 U. S. 347; *Delaware v. Stockyards*, 45 N. J. Eq. 50; *Buffalo, etc., Co. v. Buffalo*, 111 N. Y. 132; *Perrine v. Canal Co.*, 9 How. (U. S.) 172; *Parker v. Railroad*, 109 Mass. 506; *Covington v. Sanford*, 164 U. S. 578; *Ouacheta v. Aiken*, 121 U. S. 444; *Mayo v. Tel. Co.*, 112 N. C. 343; *Toledo v. Gas Co.*, 5 Oh. St. 557; *State v. Edwards*, 86 Me. 102; *West Branch v. Fisher*, 150 Pa. St. 475; 31 Am. L. Rev. 655.

affected with a public interest and those whose business is not thus affected. Where in the one case it might not be against public policy to permit contracts to exempt them from liability for negligence, in the other case it might be directly opposed to public policy. Where in the one case public policy would favor the principle of freedom of contract, in the other case it would be opposed to that principle for the reason that the public is a third party to all such contracts and has interests therein which must be protected. Bearing this distinction in mind, let us proceed to consider the question whether these exceptional bailees should be allowed to limit their liability for negligence. If the interests of the public could be as fully protected and safeguarded in this way as any other, I suppose all will admit that the best rule would be that permitting such bailees as great freedom of contract as other bailees. What rule, then, will best conserve the interests of the public?

The true reason for the extraordinary common law liability of common carriers and innkeepers for the safety of goods was the possibility of collusion, of combining with thieves against those trusting them. In the early days of the law this was a very great possibility and probability, but at the present time the reason has ceased to exist. The reason for the rule having fallen, should not the rule itself fall? This argument may have force as applied to innkeepers, but, owing to the nature of the business of common carriers, it is perhaps to be admitted that as to them there are new reasons for the extraordinary liability, as now modified, which are as strong as the old reason.<sup>1</sup>

The course of the law of innkeepers has been much the same as that of other bailees. After a period of development their extraordinary liability for the goods of a guest and their ordinary negligence liability for the safety of the person of the guest were established as their common law liability. From the time of the establishment of this rule the tendency of the law has been toward breaking it down by permitting limitations on it. But in this process, while some of the changes have been wrought out by the allowance of notices and special contracts of the parties, most of the limitations have been those resulting from statutory enactments. By analogy it is reasonable to suppose that at least as extensive contract limitations would be allowed to innkeepers as have

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<sup>1</sup> Story, *Bailments*, §§ 464-467; 11 HARV. L. REV. 158; 30 AM. L. REV. 767.

been allowed to common carriers (their common law liability being less). But, ordinarily by statute, they can escape liability for goods by posting notices only when the goods have not been deposited with them for custody as required by the notices.<sup>1</sup>

The Roman law made livery-stable keepers insurers and classed them with innkeepers and carriers, but the English law has refused to apply the doctrines to livery-stablers; nor are warehousemen, or other bailees affected with a public interest, insurers. Only innkeepers and common carriers are made approximately insurers. But whatever reasons for this liability exist today, they apply with the same force to these other public bailees as to innkeepers, and it would seem as though the rule ought to be relaxed in the one case or made more rigid in the other.

The history of the right of common carriers to contract against liability for negligence discloses a strange variety of holdings, both in the case of common carriers of goods and of passengers, for the similarity of principles and the fact that the same parties are generally engaged in both occupations sanction their treatment together. In general, as in the bailments heretofore considered, there has been an ever-increasing tendency, more marked here than in any other bailment, to allow special contracts to take the place of the common law liability. Little by little there has been a gradual breaking away from the harsh common law principle which made common carriers insurers except for the acts of God and the public enemy. Their common law liability itself has been lessened by the admission of other exceptions to it, where the loss resulted from the inherent nature of the goods or live stock, public authority and act of the shipper. But special contract exemptions have worn still further into the common law liability. In this manner common carriers have been allowed to determine the time of delivery of goods and the route of transportation, to exempt themselves from loss by fire, breakage, leakage, etc., when not due to their neglect, to limit the time to present claims and the amount recoverable in case of loss, to impose conditions and restrictions

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<sup>1</sup> Dawson *v.* Chamney, 5 Ad. & El. 164; Richmond *v.* Smith, 8 B. & C. 9; Pinkerton *v.* Woodward, 33 Cal. 557; Bodwell *v.* Bragg & Bro., 29 Ia. 232; Berkshire *v.* Proctor *et al.*, 7 Cush. (Mass.) 417; Fuller *v.* Coates *et al.*, 18 Oh. St. 343; McDaniels *v.* Robinson, 26 Vt. 316; Story, Bailments, § 486; Rev. Stat. of Ill. 1903, c. 71, § 2; Rev. Stat. of Me. 1903, c. 29, § 7; Comp. L. of Mich. 1897, §§ 5315, 5316; Rev. Stat. of Mass. 1902, 862, 863; Rev. Stat. of Minn. 1905, § 2810; Rev. Stat. of N. Y. 1901, 1744, 1746.

on passengers, and in a word to do anything that did not excuse negligence, until at last even the question of permitting them to contract against responsibility for the results of their negligence has arisen. On the rock of this question the courts have split asunder.<sup>1</sup>

So far as English common carriers are concerned, early glimmers of the right to establish by contract the liability they should be under are found as far back as Southcote's case,<sup>2</sup> where it was hinted that such a carrier might have provided against liability. In *Morse v. Slue*<sup>3</sup> it was said he "might have made a caution." In later cases it was held that by a notice brought home a common carrier could create a special acceptance, which, except for misfeasance, would control his liability in every respect. By the Land Carriers' Act of 1830 this notice feature was practically abolished, but the rule was still recognized that by a special contract the carrier could stipulate against liability for any loss, where there was no wilful wrongdoing, whether it related to goods or passengers, and whether it was caused by his negligence or not. The Railway and Canal Traffic Act was then passed, and by this it was provided that any agreement limiting a carrier's liability must be signed by the shipper and be adjudged by a court to be just and reasonable; but if these conditions are met a common carrier may make a contract which will excuse him from liability for all negligence, though not for wilful wrong.<sup>4</sup>

Hence it is seen that, by the law of England, common carriers, like all other bailees, may by contract do away with all of their common law liability except that which may be called their pure tort liability for positive wrongdoing.

The English rules are followed in Canada, Scotland, Germany, Italy, and in some of the states in our own country.<sup>5</sup>

<sup>1</sup> *Hart v. Pennsylvania*, 112 U. S. 331; *Liverpool v. Phenix*, 129 U. S. 397; *Express Co. v. Caldwell*, 21 Wall. (U. S.) 264; *Boylon v. Hot Springs*, 132 U. S. 146; *Louisville v. Sherrod*, 84 Ala. 178; *Duntley v. Railroad*, 66 N. H. 263; *Graves v. Lake Shore*, 137 Mass. 33; *O'Malley v. Great Northern*, 86 Minn. 380; U. S. *Express v. Backman*, 28 Oh. St. 144; *Richmond v. Payne*, 86 Va. 481.

<sup>2</sup> 4 Co. 84.

<sup>3</sup> 1 Vent. 238.

<sup>4</sup> *Gibbon v. Paynton*, 4 Burr. 2298; *Forward v. Pittard*, 1 T. R. 27; *Nicholdson v. Willan*, 5 East 507; *Smith v. Horne*, 8 Taunt. 144; *Chippendale v. Lancashire*, 12 L. J. C. B. 22; *Manchester v. Brown*, 8 App. Cas. 70; *Hinton v. Dibbin*, 2 Q. B. 646; *McCawley v. Furness*, L. R. 8 Q. B. 57; *Blake v. Great Western*, 31 L. J. Exch. 346.

<sup>5</sup> *The Glengoil, etc., Co. v. Pilkerton*, 28 Can. Sup. Ct. 146; *Bicknell v. Grand Trunk*, 26 Ont. App. 431; *Henderson v. Stevenson*, L. R. 2 H. L. 470.

The extreme holding in the United States is that permitting the absolute change and extinguishment of the common law liability by contract, if the parties so desire and agree. This view is taken practically only by the jurisdiction of New York. In that state the pendulum has swung to both extremes. At first it was held that a common carrier could not by contract or otherwise evade the duty thrown upon it by the common law; but after a period of development and expressions of opinion by the federal Supreme Court the courts of the State of New York swung back to enforce any contract the parties might see fit to make, provided the language of the contract is plain and distinct, though by his wilful wrongdoing the carrier may render himself liable for breach of contract.<sup>1</sup>

The theory of the New York court is that the contract between the shipper or passenger, on the one side, and the carrier, on the other, is purely a private one, with which the public has no concern, and that public policy is satisfied by holding the carrier bound to carry under his common law obligation if the shipper or passenger insists upon it and will pay the regular freight or passenger rate.

Next in liberality are some holdings exempting the carrier from liability for negligence to one riding on a free pass, or to an express messenger, or sleeping-car agents,—the entering wedge for the free pass decisions, so far as the United States Supreme Court is concerned, having been driven in the express messenger cases.<sup>2</sup> This rule, of course, refers to only a part of the carrier service.

The next most liberal holding, followed by some courts, is that permitting the common carrier by contract to provide against all liability, except for injury occasioned by fraud or gross negligence, whether to goods or passengers, provided there is a reduction in the freight or passenger rate to constitute a consideration for the agreement; and it is a question whether with these decisions should

<sup>1</sup> *Gould v. Hill*, 2 Hill (N. Y.) 623; *Nelson v. Hudson, etc., Co.*, 48 N. Y. 498; *Keeney v. Grand Trunk, etc., Co.*, 47 N. Y. 525; *Cragin et al. v. New York Central*, 51 N. Y. 61; *Gleadell v. Thomson et al.*, 56 N. Y. 194; *Bissell v. New York, etc., Co.*, 25 N. Y. 442; *Ulrich v. Railroad*, 108 N. Y. 80.

<sup>2</sup> *Baltimore v. Voight*, 176 U. S. 498; *Northern Pacific, etc., Co. v. Adams*, 192 U. S. 440; *Griswold v. New York, etc., Co.*, 53 Conn. 371; *Blank v. Illinois*, 182 Ill. 332; *Rogers v. Kennebec, etc., Co.*, 86 Me. 261; *Quimby v. Boston, etc., Co.*, 150 Mass. 265; *Bates v. Old Colony, etc., Co.*, 147 Mass. 255; *Brewer v. New York, etc., Co.*, 124 N. Y. 59; *Muldoon v. Seattle*, 10 Wash. 311; *Russell v. Pittsburg, etc., Co.*, 157 Ind. 305; 6 Cyc. 579.

not also be placed those permitting exemptions from liability to persons riding on free passes.<sup>1</sup>

The New Jersey decisions, though to be classed here, allow common carriers to contract against the negligence of their agents and servants but not against their own negligence, a position demolished as long ago as the case of *Railroad v. Lockwood*, *supra*, where the court pointed out that a common carrier is an artificial being which can act only through agents and servants, and if it should be allowed to relieve itself from the negligence of one class of servants it should from the negligence of others. Such reasoning is on a par with the recently advanced argument by analogy that the state should proceed against the property of a corporation, instead of trying to hold its officers personally liable, for analogy would require that, instead of being tied up and held idle, the property be made to produce something for the state, as criminals are made to do.<sup>2</sup>

In the cases which sustain the foregoing gross negligence exception, there arises again the question of the meaning of the term. If the courts really mean negligence, the epithet is technically a misnomer; if they mean acts which would constitute some other tort, that is another matter entirely. If the latter interpretation were adopted, all the cases thus far considered could be harmonized and placed in one and the same category, namely, the cases allowing exemptions from negligence of all kinds, all except gross negligence and all in the cases of express messengers, sleeping-car agents, and persons riding on free passes. If this interpretation is not correct, and I hardly think it would be acceptable to the courts which have used the language, the cases cannot be harmonized. The confusion here is analogous to that discovered in the unexceptional bailments.

But, even though the cases permitting these contracts against negligence could be harmonized, aside from the free pass doctrine, the great majority of the courts in this country, up to this time, have declared against the right of common carriers to make con-

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<sup>1</sup> *Northern Pacific, etc., Co. v. Adams*, 192 U. S. 440; *Boering v. Railway, etc., Co.*, 193 U. S. 442; *Cooper v. Raleigh, etc., Co.*, 110 Ga. 659; *The Southern Express v. Barnes*, 36 Ga. 532; *Illinois Central v. Read*, 37 Ill. 484; *Toledo, etc., Co. v. Biggs*, 85 Ill. 80; *Wabash, etc., Co. v. Browne*, 152 Ill. 484; *Higgins v. New Orleans, etc., Co.*, 28 La. Ann. 133; *Wilson v. Shulkin*, 51 N. C. 375; *Muer v. Chicago, etc., Co.*, 5 S. D. 568; *Amas, etc., Co. v. Railroad, etc., Co.*, 67 Wis. 46; *Black v. Goodrich*, 55 Wis. 319.

<sup>2</sup> *Kinney et al. v. Central Railroad*, 32 N. J. L. 407.

tracts exempting themselves from liability for negligence, in any degree, whether in the carriage of goods or of passengers.<sup>1</sup> It is true that a majority of our courts support the right of common carriers to limit their liability to parties riding on free passes, either absolutely or except for gross negligence; but there is some opposition to this doctrine, in either view, manifesting itself in Alabama, Iowa, Minnesota, Missouri, Pennsylvania, and Texas, sometimes on common law grounds, sometimes in statutory enactments, and the free pass cases anyway can be differentiated, made an exception, and upheld on the ground that public policy would discourage the issuance of such passes.<sup>2</sup>

The reasons given for the majority holding are, in the carriage of goods, (1) the inequality in the position of the contracting parties. The carrier enjoys a *quasi* monopoly, and though the shipper can always insist upon the common law liability or avoid an unfair contract if procured through duress or fraud, yet his remedy is so vexatious and tedious that in the long run the carrier would gain the advantage and be able to set the public at defiance. (2) These companies are in the nature of quasi-public institutions, discharging some of the sovereign functions which appropriately belong to the state, and therefore they owe a duty to the public which they cannot avoid by private contract any more than other public officials. In the carriage of passengers the reason for the rule of the majority is the interest which the state, as *parens patriæ*, has in the life and health of its citizens.

We have admitted that if it were a purely private matter between the shipper or passenger and carrier, as the New York courts maintain, absolute freedom of contract would be the best rule. Granting the public interest, it may be urged in favor of freedom

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<sup>1</sup> *Railroad v. Lockwood*, 84 U. S. 357; *N. J. Steam. Co. v. Mer. Bank*, 6 How. (U. S.) 344; *York Co. v. Central Railroad*, 3 Wall. (U. S.) 107; *Baltimore v. McLaughlin*, 73 Fed. Rep. 519; *The South, etc., Co. v. Henlein et al.*, 52 Ala. 606; *California, etc., Co. v. Railroad, etc., Co.*, 113 Cal. 329; *Camp v. The Hartford, etc., Co.*, 43 Conn. 333; *Rose v. The Des Moines, etc., Co.*, 39 Ia. 246; *Kallam v. U. S. Express*, 3 Kan. 198; *McCoy v. Erie*, 42 Md. 498; *Illinois, etc., Co. v. Crudup*, 63 Miss. 291; *Hull v. Railroad*, 41 Minn. 510; *Graham & Co. v. Davis & Co.*, 4 Oh. St. 362; *Piedmont, etc., Co. v. Railroad*, 19 S. C. 353; *Franham v. The Camden, etc., Co.*, 55 Pa. St. 53; *Railroad v. Gilbert et al.*, 88 Tenn. 430; *So. Kan., etc., Co. v. Burgess*, 90 S. W. Rep. 189; *Virginia, etc., Co. v. Sayers*, 26 Gratt. (Va.) 328.

<sup>2</sup> *Mobile v. Hopkins*, 41 Ala. 486; *Rose v. Des Moines, etc., Co.*, 39 Ia. 246; *Jacobus v. St. Paul, etc., Co.*, 20 Minn. 125; *Starr v. Great Northern, etc., Co.*, 67 Minn. 18; *Bryan v. Missouri, etc., Co.*, 32 Mo. Ap. 228; *Camden v. Bausch*, 7 Atl. Rep. 731; *Gulf v. McGowan*, 65 Tex. 640.

of contract to relax and modify the strict rule of responsibility that it would enable carriers to reduce their rates of compensation (surely a public benefit), and if this did not lead to the introduction of new evils, against which it is the policy of the law to guard, it is of course an end to be sought.<sup>1</sup> But the danger of leading in other serious evils is very great, wellnigh inevitable. The condition of our carrier service is bad enough under existing conditions; a relaxation of liability which would tend to make it more careless, more unobliging, more dangerous, would be intolerable. Again, it may be claimed, a common carrier ought not to be made an insurer without the rights of an insurer; that the only resemblance his business bears to the insurance business is his liability; and that it seems especially harsh and unjustifiable to hold the common carrier liable for the frauds perpetrated on the consignor by third parties.<sup>2</sup> The answer to this objection is that, if it is necessary to protect the interests of the public, the public, without other reason, has a right to impose even such a liability as a condition to the exercise of the carrier's franchise.

In view of all these considerations and of the methods by which at the present time common carriers must carry on their business, it seems to me it is against public policy to allow a common carrier to contract away its liability for negligence either in the carriage of goods or of passengers; but that public policy would not prohibit such contracts, clearly, in the case of the simple bailments not affected with a public interest, nor even in the case of innkeepers and other bailees affected with a public interest. The cases and legislation supporting these propositions have the better reasoning. However, in the instance of common carriers, it must be admitted, as should be expected, the tendency of the law seems to be slowly the other way, towards the allowance of special contracts. Express messengers and persons riding on free passes may now make such contracts, a great many courts allow still further latitude, and in the future progress of the law the doctrine may encroach into the territory of passengers for hire and the territory of goods and live stock. But it does not seem as though the time were yet ripe for such changes, and haste in this direction should be made slowly. Before the clamor of private convenience is listened to it should be certainly and definitely decided that the interests of the public are

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<sup>1</sup> *Railroad v. Lockwood*, 17 Wall. (U. S.) 357.

<sup>2</sup> 9 Alb. L. J. 301.



safeguarded. The effect of letting the bars of public policy down and the freedom of contract in, where that policy has been tried, has not proven an unquestioned and indisputable success. The legislation in England registers the protest of the English people against the interpretations of the courts. Dissatisfaction is felt in New York. It is not alone the fact that common carriers are pursuing a public employment that should prevent their making contracts limiting their liability for negligence,—there are other public employments perfectly compatible with absolute limitations of such liability;—it is more because of the magnitude of the business, its monopolistic character, and the conditions and dangers surrounding its management.

The bridge, which we saw stretching ahead of us at the beginning, we have now crossed, and I think I have indicated where, with the widening of the gulf, it is destined, or at least ought, to be extended.

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